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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

76-1677

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, the American Telephone and Telegraph Company and its 23 associated Bell System operating companies, request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, which is not yet officially reported, appears at Appendix A to this petition.[1] It affirmed, by a two-to-one vote, the Federal Communications Commission's First Report and Order, which is reported at 56 F.C.C.2d 593 (1975) and appears at Appendix B; the Commission's Second Re-

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[1] The appendices are separately bound in a companion volume which is cited as "Pet. App."

port and Order, which is reported at 58 F.C.C.2d 736 (1976) and appears at Appendix C; the Commission's Memorandum Opinion and Order released February 13, 1976 which is reported at 57 F.C.C.2d 1216 and appears at Appendix D; the Commission's Memorandum Opinion and Order released March 15, 1976, which is reported at 58 F.C.C.2d 716 and appears at Appendix E; and the Commission's Memorandum Opinion and Order released April 28, 1976, which is reported at 59 F.C.C.2d 83 and appears at Appendix F.

JURISDICTION

The judgment of the Court of Appeals, which was entered on March 22, 1977, appears at Appendix G. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In this case the Federal Communications Commission has established a massive new federal regulatory program requiring, with limited exceptions, FCC registration of telephone sets and other terminal equipment supplied by customers in the United States. Almost all such equipment is used for intrastate and exchange service, and the FCC program will displace long standing and pervasive state regulation of such equipment as well as drastically alter the way in which telephone service has long been provided in this country. The FCC's program will also require registration and modification of telephone company supplied terminal equipment, although such equipment has been safely connected to the telephone network for over three quarters of a century without prior federal registration (or other form of prior federal approval) and the program will impose vast direct costs on the carriers. In adopt-

ing the program, the FCC expressly declined to consider the potentially enormous increases this program will cause in telephone rates paid by the public. Nevertheless, the Court of Appeals sustained the program based on its "own analysis of the potential [economic] impact of the . . . program." Pet. App. 34a-35a. The questions presented are:

1. Whether the FCC's program, in requiring federal registration of terminal equipment used for intrastate and exchange service, violates the explicit limits on the FCC's jurisdiction under the Communications Act where Congress specifically declined to grant the FCC jurisdiction which would have encompassed such equipment and instead expressly provided in Section 2(b)(1) that (apart from radio licensing) "nothing in [the] Act" shall "apply or give the Commission jurisdiction with respect to facilities . . . for or in connection with intrastate communication service"—a prohibition on FCC jurisdiction confirmed in Section 221(b) "with respect to facilities . . . for or in connection with . . . telephone exchange service . . . even though a portion of such exchange service constitutes interstate or foreign communications"?

2. Whether, even if the express terms of the Communications Act do not preclude a claim of general FCC jurisdiction over terminal equipment, inclusion of carrier equipment in the registration program reflects an unlawful assertion of FCC authority over carrier equipment where the Communications Act grants the FCC no authority to require its approval of carrier equipment before it is attached to the telephone network and where the FCC has acted without any valid, rational reasons?

3. Whether the FCC erred in expressly refusing to consider the multimillion-dollar adverse impact of the program on telephone rates paid by the public and whether the reviewing court violated the rule of *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), by sustaining the program based on the court's own *ad hoc* economic analysis?*

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Communications Act appear at Appendix H. Pertinent portions of Part 68 of the FCC rules, setting forth the FCC's registration regulations, appear at Appendix I.

STATEMENT OF THE CASE

A. The Nature and Regulation of Telephone Service and the Provision of Terminal Equipment

Telephone service in this country is provided through a series of local telephone exchanges in individual cities. Within the local exchange area, service is provided by using local lines to link "terminal equipment"—telephone sets, PBXs, answering devices, etc.—ordinarily located at the customer's home or business to exchange switching facilities located at the telephone company's central office serving that exchange. Telephones or other terminal equipment are connected with one another through the central office switching facilities, which are controlled by the dial or other signals generated by the terminal equipment.[2]

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* If certiorari is granted, petitioners may also brief related questions involving the inadequacy of the registration program to protect the telephone network against harm from customer equipment and the power of the FCC to regulate manufacturers of customer supplied equipment.

[2] The local exchanges are connected with one another through a complex network of intercity lines. Ordinarily, long distance calls

Terminal equipment is mainly used for intrastate and exchange service.[3] Consonantly, the states have regulated the provision of terminal equipment virtually from the outset of regulated service in this country. *E.g., Gardner* v. *Providence Tel. Co.*, 49 A. 1004 (R.I. 1901). Tariffs filed with the states have long set forth the rates and conditions on which terminal equipment is provided by the telephone companies; likewise, state tariffs contain regulations governing the use of customer provided equipment with telephone company facilities (see pp. 8-9, below). State commissions exercise pervasive regulatory authority over such tariffs and the terms for the use of customer equipment. See, *e.g.*, Va. Code Ann. Title 56.

When Congress passed the Communications Act in 1934 and established the FCC to regulate interstate communications, it was well aware that facilities such as terminal equipment were used mainly for intrastate service (see p. 5, n. 3, above) and it included Section 2(b)(1) to preserve existing state regulatory jurisdiction over such facilities against possible federal encroachment. Congress also included Section 221(b) to preserve state jurisdiction over local exchange service and facilities even though such service and facilities may be used for interstate communications (*e.g.*,

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are routed between exchanges along these lines by toll switching facilities designed to handle interexchange (*i.e.*, intercity) traffic.

[3] At the time the Communications Act was passed, the figure was estimated at "97½ or 98% of all telephone communication" (78 Cong. Rec. 10316 (1934)). The figure has most recently been estimated at approximately 97 percent. *In re Telerent Leasing Corp.*, 45 F.C.C.2d 204, 211 (1974), *aff'd sub nom. North Carolina Utilities Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3432 (U.S. Dec. 13, 1976).

exchange facilities in the Washington, D.C., metropolitan area).[4] Congress thus sought in the Communications Act to complement, not supersede, existing state regulatory jurisdiction. The FCC was given authority to regulate certain aspects of telecommunications—such as the rates for "interstate" calls (Sections 201-05, 47 U.S.C.§§ 201-05) and the construction or operation of new "interstate lines" (Section 214, 47 U.S.C. § 214)—which the states could not or did not effectively control. However, the language and legislative history of Section 2(b)(1) as well as of Section 221(b) confirms (see p. 17, below) that Congress expressly withheld from the FCC any jurisdiction over matters—such as terminal equipment used for intrastate and exchange service—which are subject to effective state regulation.

In the decades since the Act was passed, states have continued to regulate terminal equipment pervasively and such equipment has continued to be provided by telephone companies under tariffs filed with the state agencies. See pp. 22-23, below.[5] Equipment has not generally been provided under tariffs filed with the FCC; nor has the FCC ever sought in past years to assert

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[4] Both Sections 2(b)(1) and 221(b) preserve the FCC's power to license radio frequencies under Section 301 (47 U.S.C. § 301) to ensure that carriers, like any other users of the limited number of available radio frequencies, do not use frequencies allocated to others. See, *e.g.*, H.R. Rep. No. 910, 83d Cong., 1st Sess. 1 (1953). Section 221(b) also requires, as a condition of exemption, that state regulation exists, which it does in every state.

[5] Thus, AT&T's FCC Tariff No. 263, which offers long-distance telephone service, makes no offering of telephones or other terminal equipment; rather, it provides (para. 1.1) that the station equipment is "furnished in accordance with Telephone Exchange Service Tariffs," that is, tariffs filed with state regulatory agencies.

any general regulatory jurisdiction over terminal equipment.[6]

Historically, in offering telephone service under state regulation, the telephone companies provided and maintained all the parts of the telephone system, including the telephone sets and other terminal equipment connected to the local exchanges. By providing and maintaining all the facilities necessary for telephone service, the telephone companies sought to protect the telephone network from any harm and to assure the highest quality of service possible.[7] This policy of "end-to-end service" by regulated utilities was followed with the explicit or implicit approval of the state regulatory agencies,[8] and it comported

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[6] For decades, the FPC never claimed any general jurisdiction over terminal equipment merely because such equipment might occasionally handle interstate calls. Only in relatively rare situations involving equipment with a uniquely interstate communications function—such as certain military facilities used in the interstate military defense network—is terminal equipment tariffed with the FCC. *E.g., United States Dept. of Defense* v. *General Telephone Co.*, 38 F.C.C. 2d 803 (1973), *review denied*, FCC 73-854 (1973), *aff'd per curiam sub nom. St. Joseph Tel. & Tel. Co.* v. *FCC*, 505 F.2d 476 (D.C. Cir. 1974).

[7] As the National Academy of Sciences has reported to the FCC, uncontrolled connection of customer supplied equipment would create a variety of hazards including "voltages dangerous to human life," impaired transmission quality, and improper network control signaling that could cause malfunctions in vital switching machinery. National Academy of Sciences, *A Technical Analysis of the Common Carrier/User Interconnections Area* 2-3, 4-7 (1970).

[8] *E.g., Peters Sunset Beach, Inc.* v. *Northwestern Bell Tel. Co.*, 60 P.U.R.3d 363 (Minn. R.R. & Whse Comm'n 1964), *aff'd*, Minn. Dist. Ct. 8th Jud. Dist. Case No. 8529 (Aug. 17, 1966); *Los Angeles* v. *Southern California Tel. Co.*, 2 P.U.R. (n.s.) 247 (Cal. R.R. Comm'n 1933); *Quick Action Collection Co.* v. *New York Tel. Co.*, P.U.R. 1920D 137 (N.J. Bd. Pub. Util. Comm'rs 1920).

with the basic approach adopted in the Communications Act for interstate service, where Congress determined that regulation rather than abstract and mechanical reliance on competition would best serve the public interest in the field of telecommunications. See *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 92-97 (1953).

B. The FCC Registration Program and Other Pertinent Proceedings

Since the 1960's, the FCC has begun to substitute a new policy of restricted competition for the regulated utility concept of telephone service. It thus took steps to promote competition in the field of interstate private lines which the FCC regulates under Sections 214 and 301 of the Act.[9] It took a further step in its *Carterfone* decision[10] invalidating interstate tariff provisions as applied to prohibit use of a non-carrier device connecting two communications systems for "interstate or foreign telephone service."

Carterfone did not purport to interfere with intrastate tariffs or the states' historic jurisdiction over terminal equipment in general, and the FCC subsequently made clear that its decision in *Carterfone* did not authorize a customer to "substitute his own equipment or facilities . . . for that furnished by the telephone company. . . ."[11] Nevertheless, the Bell System

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[9] *Allocation of Frequency in Bands Above 890 Mc*, 29 F.C.C. 825 (1960); *In re MCI*, 18 F.C.C.2d 953 (1969), *recon. denied*, 21 F.C.C.2d 190 (1970).

[10] *Carterfone*, 13 F.C.C.2d 420, 441, *recon. denied*, 14 F.C.C.2d 571 (1968).

[11] *AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 609-10 (1968), *recon. denied*, 18 F.C.C.2d 871 (1969).

and other telephone companies filed with the states new tariffs that generally permitted customer provided terminel equipment to be connected to the telephone line through "protective connecting arrangements" which safeguard telephone company employees and facilities against improper transmission of signals or excessive voltages. As a further safeguard, the new tariffs also required that the telephone companies provide the network control signaling units—the devices which generate the control signals to operate the exchange switching equipment at the telephone company's central office.[12]

In June 1972, the FCC instituted the present proceedings to create opportunities for customers to substitute their own terminal equipment for carrier supplied equipment. *Interstate and Foreign MTS and WATS,* 35 F.C.C.2d 539 (1972). The FCC proposed to eliminate the requirements that carrier connecting arrangements and network control signaling units be used where customers substituted their own terminal equipment. *Id.* In a supplemental notice, the FCC represented that the economic issues posed by its new approach would be "cover[ed] . . . by further supplemental notices in the near future" (40 F.C.C.2d 315, 318 (1973)), and it requested comment on a proposed registration program as a substitute for the carrier connecting-arrangement requirements prescribed by applicable tariffs. *Id.* at 316-17.

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[12] While connecting arrangements and network control signaling units normally are furnished pursuant to state tariffs (except for those uniquely interstate situations in which terminal equipment is tariffed on an interstate basis, see p. 7, n. 6, above), the telephone companies revised their interstate tariffs as well as their state tariffs since the FCC had ordered them in *Carterfone* to remove existing restrictions with respect to interstate communications.

While the FCC was proceeding with its proposals, state authorities were becoming increasingly concerned about the economic consequences. The National Association of Regulatory Utility Commissioners ("NARUC") undertook a study which concluded that expanded customer substitution would increase telephone rates for ordinary local residential and business telephone users by $360-740 million annually by 1980 and by almost $1 billion annually by 1984.[13] Several state regulatory authorities began to consider proposals to limit the expansion of customer substitution of intrastate and exchange facilities and services for those provided by the telephone companies. See *In re Telerent Leasing Corp., supra,* 45 F.C.C.2d at 204-05.

In response the FCC made a general declaration in the *Telerent* case that the states could not disregard FCC policy established within the ambit of FCC jurisdiction and that FCC jurisdiction extended to the regulation of terminal equipment connected to local exchanges. 45 F.C.C.2d at 221. Yet, in *Telerent,* the FCC once again promised to expend its registration case to consider the economic consequences of expanded customer substitution. *Id.* at 222-23. Shortly thereafter, the FCC established Docket No. 20003 as a separate inquiry into the economic impact of *inter alia* customer provision of terminal equipment, acknowledging that "the use of customer provided facilities in lieu of those offered by the carriers may affect the rates for services to other customers." *Customer Interconnection,* 46 F.C.C.2d 214, 215 (1974).

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[13] NARUC, *Report After Investigation* 19 (1974). NARUC is the national organization of state commissioners responsible for utility regulation in the states.

On November 7, 1975, with the economic inquiry in Docket No. 20003 uncompleted, the FCC released its First Report and Order in the registration proceeding.[14] 56 F.C.C.2d 593 (Pet. App. 1b). The First Report and Order promulgated FCC regulations establishing a sweeping new program for federal registration of all types of terminal equipment with the exception of certain categories of equipment including PBXs, key telephone systems, and main station telephones. A few months later, these last three categories of equipment were also made subject to the program by the FCC's Second Report and Order. 58 F.C.C.2d 736 (Pet. App. 1c).[15]

Under the registration program, customer supplied terminal equipment registered with the FCC may—contrary to most existing state tariffs—be directly connected to a carrier's exchange facilities without the use of either a connecting arrangement or a carrier supplied network controlling signaling unit as is presently required to protect the network and telephone company employees from harm.[16] Pet. App. 6i.

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[14] The FCC issued a First Report in Docket No. 20003, belittling the potential impact of customer substitution, only *after* the present case had been argued and submitted to the court below. Although apprised of the decision in Docket No. 20003, the majority opinion placed no reliance on it (see p. 36, n. 62, below) and—given the procedural errors and gross disregard of the evidence in Docket No. 20003—the FCC could not have permissibly rested its registration program upon that decision. See pp. 35-36, below.

[15] Two commissioners dissented from the FCC's Second Report and Order, one of whom explicitly argued that the Commission should not extend "the registration requirement to PBX equipment without first having examined the social and economic impact of this decision." Pet. App. 24c.

[16] Moreover, to facilitate the substitution of customer equipment,

Carriers must also register their *own* terminal equipment before connecting it to their *own* network (Pet. App. 15b-16b), even though they have safely utilized their own equipment for decades and even though this will require carriers to modify their equipment needlessly and expend millions of dollars for registration. See pp. 27-28, below.[17] Finally, despite its earlier promise to consider the economic impact of expanded customer substitution (see pp. 9-10, above), the FCC declined to address this issue before adopting its registration program. See Pet. App. 14b, 6c-7c; pp. 32-33, below.

C. The Decision Below

The FCC's registration orders were affirmed by the Court of Appeals for the Fourth Circuit by a two-to-one vote. Pet. App. 1a.[18] However, prior to reviewing

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carriers must generally arrange their facilities so that connection can readily be made through "standard plugs and standard telephone company-provided jacks." Pet. App. 61. Yet, even while the registration program purports to establish technical requirements that justify permitting easy, direct connection of customer equipment, thereby facilitating customer substitution, the program contains serious omissions in terms of adequate procedures and standards for quality control in the manufacture of terminal equipment and for the maintenance and repair of such equipment after installation. The National Academy of Science has independently determined that adequate procedures and standards in these areas are essential to any program which would permit the direct electrical connection of terminal equipment to the telephone network. National Academy of Science, *A Technical Analysis of the Common Carrier/User Interconnections Area* 50-51 (1979).

[17] One Commissioner dissented from the imposition of carrier equipment, pointing out that the carriers had built-in incentive to protect their own network from harm from their own equipment and thus carrier registration was merely "regulatory overkill which cannot be supported by logic or experience." Pet. App. 54b.

[18] The orders affirmed by the Court of Appeals were the FCC's

the orders, the Court of Appeals stayed the major aspects of the registration program, recognizing that the program's impact would be largely irreversible. Pet. App. 1j-12j. The court has continued that stay in effect pending petitions for certiorari.[19] Pet. App. 13j.

Prior to the decision below, another panel of the Fourth Circuit had affirmed the FCC's *Telerent* decision in *North Carolina Utilities Comm'n* v. *FCC*, 537 F.2d 787 (1976), *cert. denied*, 45 U.S.L.W. 3432 (U.S. Dec. 13, 1976) ("*North Carolina I*") and had ruled that Sections 2(b)(1) and 221(b) do not bar the FCC from claiming regulatory jurisdiction over terminal equipment connected to local exchanges. This case, however, involves not merely some abstract declaration of FCC jurisdiction but rather a major federal regulatory program displacing existing state authority. Against this background, the panel below agreed to reexamine the holding of *North Carolina I*, emphasizing that the FCC's action "implicat[ed] significant state and federal interests." Pet. App. 12a. Nevertheless, on the merits, the panel adhered to *North Carolina I* by a two-to-one vote.[20]

First and Second Reports and Orders and three supplemental orders that were released February 13, 1976, March 15, 1976, and April 28, 1976 and are set forth in Appendices D, E and F. The court's jurisdiction was invoked by petitions for review filed pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

[19] The court's stay, which continues in effect, prevents the FCC from implementing its registration program for all carrier equipment and for PBXs, key systems, main stations and extension telephones; the program has been allowed to commence only for customer provided data and ancillary equipment (*e.g.*, answering devices) other than extension telephones—a phase of the program having significantly less impact. Pet. App. 1j-12j.

[20] Because of disqualifications in the Fourth Circuit, the decision in *North Carolina I* was rendered by Judge Hastie, joined by

The majority also rejected the claim that the FCC's inclusion of carrier equipment in the registration program was an irrational and unjustifiable exercise of a non-existent power. Pet. App. 25a-26a, 27a-29a. The majority could not cite any provision of the Act expressly granting the FCC authority to require prior federal approval of carrier equipment. Nor did the majority opinion address the carriers' detailed arguments that the FCC's decision to require carrier-equipment registration rested on irrational and improper reasons, even assuming the FCC did possess the requisite prior-approval power.

Finally, although the FCC explicitly refused to resolve the economic impact of expanded customer substitution, the majority opinion found that this failure to consider a pertinent public interest issue was not fatal. Unable to point to any reasoned analysis by the FCC of the registration program's economic impact on the public, the majority opinion itself sought—despite the rule clearly established by *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943)—to provide the analysis which the FCC should have performed. Pet. App. 30a-32a. Not surprisingly, the court's own *post hoc* conclusion that the registration program's economic impact will not be severe rests on untested and incorrect analysis and assertions. See pp. 35-36, below.

Judge Tuttle; Judge Widener, the only available member of the Fourth Circuit, dissented. The decision in this case was rendered by Judge Tuttle, joined by Judge Rives; Judge Widener again dissented. *En banc* consideration by the Fourth Circuit has been unavailable in both cases because of disqualifications.

REASONS FOR GRANTING THE WRIT

This case involves the validity of one of the most significant and far reaching administrative programs ever undertaken by a federal agency. With the registration program, the FCC seeks to regulate generally and pervasively over 100 million pieces of terminal equipment which have routinely been the subject of *state*—not federal—regulation for over 50 years. The FCC's extraordinary action is premised on an erroneous claim to a regulatory jurisdiction which is explicitly prohibited by the plain language of the Communications Act, is directly contrary to Congress' express intent in enacting the Act, and will have a wide-ranging and severe impact on the way in which telephone service has traditionally been provided and regulated in the United States.

An abstract assertion of such regulatory jurisdiction was considered in *North Carolina I*. It is only with this case, however, that the FCC has sought to adopt a specific regulatory program based on its jurisdictional claim over terminal equipment. Thus, this case, for the first time, brings into sharp focus the extraordinary reach of the FCC's attempted regulatory grasp (see Pet. App. 1i-39i) and the immediate displacement of state authority that has endured for decades. Moreover, since the FCC has now adopted a specific program, this case arises in the concrete context in which this Court is accustomed to considering important issues involving allocation of regulatory jurisdiction between state and federal authorities.[21]

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[21] See, *e.g.*, *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395 (1975); *FTC* v. *Bunte Bros., Inc.*, 312 U.S. 349 (1941); *North Carolina* v. *United States*, 325 U.S. 507 (1945).

In short, the registration program presents a far different—and far stronger—case for certiorari than did *North Carolina I*.[22]

Furthermore, unlike *North Carolina I*, this case raises two other extremely important issues independently warranting review by this Court. First, the FCC is seeking to exercise an unprecedented and nonexistent regulatory power over carrier terminal equipment simply to attain competition for competition's sake, without regard to whether such competition is consistent with the public interest. See *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 97 (1953). Second, the lower court's attempt to sustain the program on the basis of its "own analysis of the potential [economic] impact of the . . . program" (Pet. App. 34a-35a) violates this Court's long-standing rule that agency action can be sustained solely on the basis of "what the Commission did" and "not by what it might have done." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 93-94 (1943).

I. The Decision Below Presents A Major Question of Statutory Jurisdiction Which Has Not Been But Should Be Considered By This Court.

1. The FCC's registration program is a major extension of agency jurisdiction in direct defiance of Congress' express statutory prohibition.[23] The statu-

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[22] This is emphasized by the fact that even the lower court concluded that full reconsideration of the jurisdictional issue—as starkly posed for the first time by the registration program—was warranted in this case although the issue had previously been considered by another panel of the same court in *North Carolina I*. Pet. App. 11a-12a.

[23] The issue is whether Congress by statute *prohibited* the FCC's exercise of authority and not whether Congress could have per-

tory language is the concrete expression of Congress' purpose and the hinge of any sound interpretation.[24] Here, the statutory language is unequivocal:

> "Subject to the provisions of Section 301 [regarding the licensing of radio frequencies], *nothing in this Act* shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, *facilities,* or regulations *for or in connection with intrastate communication service* . . ." (emphasis added). Section 2(b)(1).[25]

No one denies that terminal equipment constitutes "facilities" or that the FCC's registration program asserts "jurisdiction" over and seeks to "apply" the Act to such facilities. It is equally beyond rational dispute that the vast preponderance of terminal equipment embraced by the registration program is used "for or in connection with" "intrastate" (Section 2(b)(1)) and "exchange" (Section 221(b)) services: generally, terminal equipment is connected directly to local exchanges, is provided under terms contained in state tariffs, and is used mainly for intrastate and local service. See pp. 4-5, above.

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mitted the FCC to displace state registration. Accordingly, the question presented is one of Congressional intent, not one of power.

[24] *Caminetti* v. *United States,* 242 U.S. 470, 485 (1917); *62 Cases* v. *United States,* 340 U.S. 593, 596 (1951).

[25] Similarly, Section 221(b) provides:

> "Subject to the provisions of Section 301, *nothing in this Act* shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, *facilities,* or regulations *for or in connection with . . . telephone exchange service* . . . even though a portion of such telephone exchange service constitutes interstate or foreign communications . . ." (emphasis added).

The majority opinion did not directly deny that Congress meant to prevent FCC regulation (apart from Section 301) of all facilities embraced by Sections 2(b)(1) and 221(b); but it purported to find latent in the provisions a question whether terminal equipment constitutes "'intrastate' facilities over which state jurisdiction is to be primary." Pet. App. 14a. The majority then reasoned that the equipment subject to the registration program was within the FCC's jurisdiction since such equipment may be used both for interstate and intrastate communication. According to the majority, "the withdrawal of jurisdiction over one [intrastate communications] cannot be read to mean the withdrawal as to the other [interstate communications]." Pet. App. 14a.

The lower court clearly misconstrued the statute—contrary to its plain language—when it proceeded to resolve the jurisdictional question by deciding that terminal equipment should be treated as "interstate" rather than "intrastate" facilities (Pet. App. 14a) because such equipment may be occasionally used for interstate as well as intrastate communication.[26] Under the statute's express terms, jurisdiction is allocated on the basis of whether the facilities are used "for or in connection with" intrastate or exchange service. Not even the majority below denied that terminal

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[26] Even if the statute did pose a question as to whether terminal equipment should be treated as "interstate" or "intrastate" facilities, it is inconceivable that such equipment should be deemed "interstate" rather than "intrastate" in character when it is connected directly into local exchanges as a part of the "exchange plant" (see *In re Telerent Leasing Corp., supra*, 45 F.C.C.2d at 215), is utilized almost all of the time for intrastate and exchange calls (see p. 5, n. 3, above) and has been generally provided under state tariffs for over 50 years (see pp. 22-23, below).

equipment is integrally employed for that purpose. Once it is acknowledged that terminal equipment is in fact used "for or in connection with" intrastate and exchange service, the overriding prohibition of Section 2(b)(1) as well as of Section 221(b) explicitly applies and it is then irrelevant that intermittent interstate use might *otherwise* permit FCC regulation.[27]

Consistently with this construction, the FCC itself, as recently as 1973, advised Congress that:

> "[W]e . . . lack primary jurisdiction over telephone sets which are a primary part of the facilities used in providing exchange telephone service. As you know, the Communications Act specifically *excludes* the Federal Communications Commission from any authority with respect to charges, classifications, practices, services, *facilities* or regulations for or in connection with intrastate and exchange telephone services of *any* telephone company." Letter from the FCC Chairman, 119 Cong. Rec. 30962 (1973) (emphasis added).

The present subject of the FCC's registration program includes this same "telephone set" over which the FCC disclaimed jurisdiction less than four years ago in language borrowed directly from Sections 2(b)(1) and 221(b).

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[27] This reading is confirmed by the express reservation in Section 2(b) as well as in Section 221(b) preserving the FCC's radio licensing authority under Section 301. A reservation clearly was needed to preserve this otherwise applicable power from being cut off for facilities, such as radio telephones, which use radio frequencies. This express Section 301 reservation confirms that all *other* FCC powers otherwise allegedly applicable to Section 2(b)(1) and 221(b) facilities *are* precluded by the "nothing in this Act" prohibition of these two sections. See also p. 23, n. 37, below.

The very purpose of the reservation of state jurisdiction in the Act was "to protect the State commissions against being overridden" by the FCC and to preserve for the states "exclusive" jurisdiction in the sphere expressly reserved to them by statute.[28] After protests by thirty-seven state commissioners and the state commissioners' national association,[29] early versions of draft bills proposing the Act were revised to omit language that would have facilitated federal control and to include the specific prohibitions that emerged as Sections 2(b)(1) and 221(b).[30] The legislative history of the Act thus confirms Congress' specific intent to prevent the FCC from displacing existing state jurisdiction over terminal equipment.

The lower court's failure to follow the plain language of a governing jurisdictional statute is, standing alone, ample basis for review here. The court's error is multiplied by its disregard of the FCC's own prior disclaimer of jurisdiction and of Congress' clear intent. This case is the epitome of an "important question of regulatory authority" normally considered on certiorari. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 161 (1968).[31]

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[28] *Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 179 (1934); S. Rep. No. 781, 73d Cong., 2d Sess. 3 (1934).

[29] See *Hearings on S. 6 Before the Senate Comm. on Interstate Commerce*, 71st Cong., 1st Sess. 2167 (1930).

[30] See S. 2910, § 210, 73d Cong., 2d Sess. (1934), introduced 78 Cong. Rec. 3275 (1934); H.R. 8301, § 210, 73d Cong., 2d Sess. (1934), introduced 78 Cong. Rec. 3367 (1934).

[31] See also *FPC* v. *Conway Corp.*, 44 U.S.L.W. 4777 (U.S. June 7, 1976) (Federal Power Act); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954) (Natural Gas Act); *North Carolina* v.

2. The immediate impact and continuing implications of the FCC's registration program also argue strongly for plenary review by this Court. This program is one of the most far-reaching ever undertaken by the FCC—affecting over 1600 telephone companies, thousands of equipment suppliers, ultimately millions of customers, and over 100 million pieces of terminal equipment.[32] Even if the adverse impact on telephone rates is only a fraction of the sums predicted by NARUC (see p. 10, above), the program will result in the increase of telephone bills by millions of dollars over the next decade.

The registration program is certain to change dramatically the way in which telephone service has long been provided in this country. It will permit massive direct connection of customer equipment to the carriers' network. See p. 31 & p. 34, n. 59, below. In every realistic sense, the FCC's "plug-in" registration program will effectively destroy the policy of end-to-end telephone service (see p. 7, above)—long encouraged by regulatory authorities—which has given "the United States . . . the finest telephone system in the world."[33]

United States, 325 U.S. 507 (1945) (Interstate Commerce Act). The majority opinion relied directly on *FPC* v. *Conway*, *supra* (Pet. App. 17a-18a), but *Conway* dealt only with the question whether the FPC, in exercising its authority over matters clearly within its jurisdiction, might consider matters outside its jurisdiction. Here, by contrast, the question is whether the FCC may extend its jurisdiction over matters expressly excluded from its jurisdiction by Congress.

[32] A cursory review of the FCC's new regulations (see Pet. App. 1i-39i) confirms the magnitude of the registration program.

[33] President's Task Force on Communications Policy, *Final Report*, ch. 6, p. 5 (1968).

In addition, the registration program will effect a major upheaval in the present allocation of regulatory jurisdiction over terminal equipment, displacing authority long exercised by state regulatory agencies. The majority opinion itself conceded that "[t]he vast majority of terminal equipment has been—and is—regulated by the states . . . ." Pet. App. 23a. Since regulated telephone service began, *state* tariffs have contained the rates, conditions and regulations governing provision of almost all terminal equipment (including the ordinary home telephone), as well as the regulations governing the use of customer provided equipment. Both before and after enactment of the Communications Act, it is *state* authorities,[34] not federal authorities,[35] who have actively regulated nearly every

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[34] The following are merely a small sampling of the myriad of state regulatory decisions concerning terminal equipment: see *e.g.*, *Gardner* v. *Providence Tel. Co.*, 49 A. 1004 (R.I.), *rehearing denied*, 50 A. 1014 (1901); *In re Telephone Companies*, P.U.R. 1915A 1032, 1046 (S.D. Bd. R.R. Comm'rs 1915); *Littlepage* v. *Mosier Valley Tel. Co.*, P.U.R 1918E 425 (Ore. Pub. Serv. Comm'n 1918); *Quick Action Collection Co.* v. *New York Tel. Co.*, P.U.R. 1920D 137 (N.J. Bd. Pub. Util. Comm'rs 1920); *Re Farmers Fountain Tel. Co.*, P.U.R. 1926C 363 (Ill. Comm. Comm'n 1926); *Los Angeles* v. *Southern California Tel. Co.*, 2 P.U.R. (n.s.) 247 (Cal. R.R. Comm'n 1933); *King* v. *Pacific Tel. & Tel. Co.*, 16 P.U.R. (n.s.) 348 (Ore. Pub. Util. Comm'n 1936); *Peters Sunset Beach, Inc.*, v. *Northwestern Bell Tel. Co.*, 60 P.U.R. 3d 363 (Minn. R.R. & Whse Comm'n 1964), *aff'd* Minn. Dist. Ct. 8th Jud. Dist. Case No. 8529 (Aug. 17, 1966); *Jacobsen* v. *Northwestern Bell Tel. Co.*, 61 P.U.R. 3d 541 (S.D. Pub. Util. Comm'n 1965); *Netsky* v. *Bell Tel. Co. of Pa.*, 65 P.U.R. 3d 145 (Pa. Pub. Util. Comm'n 1966); *Racine Flash Cab Co.* v. *Wisconsin Tel. Co.*, 65 P.U.R. 3d 321 (Wis. Pub. Serv. Comm'n 1966).

[35] In a few instances involving devices with a peculiarly interstate function (such as interstate defense facilities), terminal equipment has been tariffed with the FCC, but until recently the FCC has never asserted, much less exercised, any general regula-

aspect of terminal equipment, including the connection of customer equipment.

The jurisdictional issue raised by the registration program with respect to facilities will be a recurring problem for the lower federal courts unless an authoritative construction of Section 2(b)(1) as well as of Section 221(b) is provided by this Court. The First Circuit has only recently been confronted with a question of FCC jurisdiction over certain intrastate and exchange facilities.[36] The District of Columbia Circuit has had to resolve a similar question in a decision in which it recognized the preclusive effect of the Act's reservation of state jurisdiction.[37]

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tory jurisdiction over terminal equipment. See pp. 6-7, above. In addition, the few FCC decisions claiming to regulate specific pieces of terminal equipment for quite limited purposes normally framed the claim of FCC authority—as the lower court admitted—to apply to the use of equipment for "interstate" purposes. Pet. App. 21a-23a.

[36] *Puerto Rico Telephone Company* v. *FCC*, No. 76-1134 (1st Cir. March 31, 1977). The First Circuit upheld FCC jurisdiction, relying on *North Carolina I*. However, the First Circuit opinion also acknowledges that "[r]ead literally, these provisions [Sections 2(b)(1) and 221(b)] do appear to preclude the federal jurisdiction extended elsewhere in [the Act]" (p. 7) and—so far as Section 2(b)(1) is concerned—"[t]he conflicting statutory language leaves the matter far from free of doubt" (p. 8).

[37] *Kitchen* v. *FCC*, 464 F.2d 801 (D.C.Cir. 1972). There, the court concluded that Section 221(b) barred FCC jurisdiction over an exchange building despite the assertion that some traffic switched through the facility was interstate and brought it within the FCC's authority under Section 214. Citing the statutory language and legislative history, the court determined that "even" if Section 214 otherwise applied, "an exercise of jurisdiction would still be precluded by Section 221(b)." *Id.* at 803. See also *NARUC* v. *FCC*, 533 F.2d 601, 610-11, 617 (D.C. Cir. 1976) (Section 2(b)(1)).

Nor is the impact of the jurisdictional issue limited simply to "facilities." Sections 2(b)(1) and 221(b) also apply to "services" and "rates" for and in connection with intrastate or exchange services. The logic of the jurisdictional claim will inevitably be invoked beyond "facilities," and in fact the FCC has already begun to usurp state jurisdiction over intrastate service [38] and to threaten state jurisdiction over intrastate rates.[39] The underlying jurisdictional issue should be resolved now to avoid years of bitter and continuing dispute about the reach of FCC authority under this keystone jurisdictional limitation.

In fact, review of the jurisdictional issue cannot be further delayed if it is to be truly meaningful. Apart from future extensions of the FCC's jurisdictional claim, the registration program once fully implemented will become irreversible; after millions of pieces of customer terminal equipment have been directly attached to telephone lines, no one seriously imagines that this process can or will be undone. Millions of dollars in costs for carrier equipment will be incurred in the *first year* alone. See pp. 27-28, below. The lower court's stay implicitly acknowledges that review must occur now before the massive registration program fully takes effect.

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[38] In *AT&T*, 56 F.C.C.2d 14 (1975), *pet. for review pending sub nom. California* v. *FCC*, D.C. Cir., No. 75-2060, the FCC ordered AT&T to allow a private line carrier to provide a particular type of *intrastate* service specifically barred by California, in addition to authorized interstate services.

[39] In the course of examining the separation of interstate and intrastate revenues, the FCC has just revealed that it is considering requiring revision of local telephone rates "to insure that business vertical services" are not benefited by any increases in intrastate revenues. FCC 76-1008, released Nov. 8, 1976.

II. The FCC Lacks Power To Require Carriers To Register Their Own Terminal Equipment, and Its Rationale For Carrier Registration Conflicts with this Court's RCA Decision.

1. Apart from the jurisdictional issue, certiorari is warranted to review the FCC's unprecedented claim of power to require registration of *carrier* equipment. Most terminal equipment in the United States is still provided by carriers so the registration program has its most immediate and severe impact on the carriers themselves.[40] Under the registration program the FCC would require carriers to obtain FCC approval before they attach their own terminal equipment to their own network.

The Communications Act does not confer any statutory power on the FCC to require such prior approval of carrier terminal equipment. Title II of the Act explicitly states the circumstances in which the FCC has authority to require prior approval of common carrier facilities, whether such prior approval is described as licensing, certification or "registration": under Section 214, certificates of public convenience are required where a carrier proposes to construct or operate any new interstate "line."[41] No such power was conferred with respect to carrier terminal equipment, and—since Congress clearly knew how to confer this power when it

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[40] For this reason most of the immediate multimillion dollar costs of the program stem from carrier registration (see pp. 27-28, below); by contrast, the ultimate economic impact of the program, amounting to hundreds of millions of dollars in increased rates, derives from customer substitution. See pp. 31-32, below.

[41] Similarly, under Title III, where Congress delineated the FCC's authority over radio, prior approval is required before any apparatus for transmitting radio signals is employed. See Section 301, 47 U.S.C. § 301.

wished to do so—the compelling inference is that it did not wish to do so here.

The legislative history of the Communications Act confirms this inference. In early drafts, the statute *did* include provisions requiring any subsidiary or parent of an interstate carrier to obtain FCC approval prior to furnishing "equipment" to the carrier itself. These provisions are as close as Congress came to authorizing prior FCC approval of carrier equipment. The concept was not accepted and the provisions were not enacted.[42]

Neither the FCC nor the court below has provided any firm statutory basis for requiring registration of carrier terminal equipment. Without discussion, the FCC provided only a string citation of miscellaneous statutory provisions. Pet. App. 37b.[43] Apparently even the lower court did not find most of these provisions of any help; it relied solely on Section 205 of the Act. But that section does not even mention carrier facilities or apparatus, and the court did not—and could not—

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[42] See Section 215(b) of S. 2910, 73d Cong., 2d Sess., and H.R. 8301, 73d Cong., 2d Sess., 78 Cong. Rec. 3275, 3367 (Feb. 27, 1934). Compare the present Section 215(b), 47 U.S.C. § 215(b).

[43] Sections 4(i), 4(j), 201-05, 208, 215, 218, 313-14, 403-04, 410 and 602, 47 U.S.C. §§ 154(i), 154(j), 201-05, 208, 215, 218, 313-14, 403-04, 410, and 602. Section 4(i) merely empowers the FCC to make rules implementing authority otherwise conferred. Section 4(j) authorizes the Commission to "conduct its proceedings." Sections 201-05 conspicuously omit "facilities" in any respect pertinent here. Section 208 allows anyone to complain to the Commission. Section 215 directs the Commission to examine and report to Congress. Section 218 authorizes the Commission to "inquire into the management" of carriers. Sections 313-14 deal with radio apparatus and transmissions. Sections 403-04 and 410 empower the Commission to conduct inquiries and to establish joint boards. Section 602 sets forth various repeals and amendments.

explain how the provision authorized the FCC to require prior registration of carrier terminal equipment."

The power of the FCC, like that of any administrative agency, "is circumscribed by the authority granted" by Congress. *Stark* v. *Wickard,* 321 U.S. 288, 309 (1944). When the agency summons vast new powers out of thin air, it is the court's obligation to restrain it.[45] In the present case, review by this Court is required because, just as the FCC has forgotten that non-existent powers "cannot be merely assumed," so the majority opinion has ignored the warning that neither can such powers be "created by the courts in the proper exercise of their judicial functions." *FTC* v. *Raladam Co.,* 283 U.S. 643, 649 (1931).[46]

2. The immediate direct costs of carrier registration are a further exigent reason why review is warranted. Carrier registration will cost the Bell System itself over $88 million in the *first year* alone,[47] quite

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[44] The fact that the FCC has never before claimed such a power under Section 205, or under any other provision, is further potent evidence that the power is imaginary. See *FPC* v. *Panhandle Eastern Pipe Line Co.,* 337 U.S. 498, 513 (1949).

[45] The FCC, in its zeal to advance its new policy of restricted competition, has repeatedly exceeded or misapplied its powers. See *AT&T* v. *FCC,* 487 F.2d 865 (2d Cir. 1973); *Hawaiian Telephone Co.* v. *FCC,* 498 F.2d 771 (D.C. Cir. 1974); *GTE Service Corp.* v. *FCC,* 474 F.2d 724 (2d Cir. 1973).

[46] Because the prior permission power is not merely absent but negated by statutory language and legislative history, the decisions cited by the majority opinion involving implied power (Pet. App. 25a n.20) are inapposite. Rather, this case resembles *AT&T* v. *FCC, supra,* where the court found that a prior permission power to bar rate changes could not be implied.

[47] Affidavit of Joe H. Hunt, para. 6, filed with the Court of Appeals, April 8, 1977. The cost estimate has changed several times

apart from the costs inflicted on 1600 other telephone companies and continuing costs after the first year. This Court has traditionally given weight to the practical impact of cases being considered for review; and the impact of $88 million in first year costs, much of which will ultimately be borne by the public through increased rates, cannot be ignored when the statutory basis for inflicting the loss is non-existent.

3. Even if the FCC had power to require prior registration of carrier equipment, its basic reason for exercising that power in this case conflicts in principle with this Court's decision in *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953) and that of the District of Columbia Circuit in *Hawaiian Telephone Co.* v. *FCC*, 498 F.2d 771 (1974). Such a conflict is a settled ground for certiorari. Sup. Ct. R. 19(1).

The registration program was designed to facilitate substitution of customer supplied equipment by allowing registered customer sets to be used without connecting arrangements or carrier network control signaling units. See p. 11 & n. 16, above. The FCC's reason for also requiring registration of carrier equipment was simply to "equalize" competitive positions of carriers and non-carriers as equipment suppliers and thereby—as the dissenting judge below observed—"[promote] . . . competition in the terminal equipment market" (Pet. App. 43a). The FCC expressly stated

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simply because the FCC keeps modifying its registration program (see *id.* at para. 5), but all of the estimates involve multimillion dollar costs. Nowhere has the FCC ever provided any analysis to refute these detailed computations (see Pet. App. 15b-16b) despite its generalized and incorrect claims that the expense will be minimal. See, *e.g.*, Pet. App. 4d.

that "when one participant in a competitive market is subject to regulatory constraints (*e.g.*, registration of equipment) while another is not, there exists the possibility of using . . . [registration procedures] for competitive advantage." Pet. App. 15b-16b.

Apart from the fact that this rationale for carrier registration is patently illogical,[48] it defies the basic principal of carrier regulation under the Communications Act: the touchstone of FCC action must be the *public interest* and not mere enhancement of competition. *FCC* v. *RCA Communications, Inc., supra,* 346 U.S. at 97. Here, the FCC has sacrificed the public interest by imposing a minimum of $88 million in first year costs merely to pursue abstract goals of competitive equality. As the District of Columbia Circuit said in striking down another FCC order:

> "[I]t is all too embarrassingly apparent that the Commission has been thinking about competition, not in terms primarily as to its benefits to the public but specifically with the objective of equalizing competition among *competitors.*" *Hawaiian Telephone Co.* v. *FCC,* 498 F.2d 771, 775-76 (1974) (emphasis in original).

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[48] Carrier registration would not lessen the delay in customer registration but expand it by adding more, unnecessary applications to clog the bureaucratic gristmill. Moreover, as a dissenting Commissioner observed: The FCC has ample means "short of meaningless [carrier] registration" to preclude "possible anticompetitive practices," which are not in any case established by the record. Pet. App. 54b-55b. And, in any event, carrier registration cannot in fact equalize competitive opportunities: customer suppliers have enormous advantages of their own, including the opportunity to change prices at will without filing tariffs; yet, the FCC has not equalized treatment in this respect or in many others.

This conflict in applying a central principle of the Act warrants certiorari. The remaining explanations given by the FCC for requiring carrier registration are so plainly fabricated that they lend no support to the requirement whatever.[49] In fact, so far as they are considered at all, their makeweight character underscores the FCC's main object to "equalize" competition and their irrationality further condemns its requirement of carrier registration.

III. The Court Below Plainly Violated the Chenery Doctrine in Substituting its Own Economic Conjectures for Findings the FCC Erroneously Failed To Make.

The basic rules for judicial review of administrative action are that an agency must consider all perti-

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[49] The FCC asserted that carrier equipment has the same "potential" for harm as customer equipment (Pet. App. 15b); but it also admitted that the carriers themselves have both the incentive and "ability" to protect their own network from being harmed by their own terminal equipment (Pet. App. 15b), and it made a mockery of any claim of potential harm by "grandfathering" 100 million carrier supplied telephones already in place. Pet. App. 2f-6f. What is more, provision of terminal equipment by carriers is carefully supervised by the states. And while a report by the National Academy of Science has concluded that a properly enforced certification program for *customer* provided equipment would be appropriate, the Academy's report nowhere suggests any need for such a program with regard to carrier equipment. National Academy of Science, *A Technical Analysis of the Common Carrier/User Interconnections Area* 8-14, 48-56 (1970).

The FCC also alleged that information it obtains from carrier registration may be useful to it in customer registration. Pet. App. 15b. However, the FCC does not deny that it can obtain the same information from carriers directly under Section 218 of the Act; thus, this rationale cannot explain why carrier equipment must be subject to the prior approval requirement of registration or must be technically modified under the program when it has worked safely for years.

nent factors and consequences of its action, *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), and that a reviewing court may sustain the agency only on the basis of the agency's own proper resolution of such issues. *SEC* v. *Chenery Corp., supra.* In this case, violation of these precepts is so patent that summary reversal would be justified if plenary review on other issues were not granted.

In eliminating connecting arrangements and network control signaling units designed to protect the network and telephone company employees from harm, the registration program creates an "open door" to customer substitution of terminal equipment.[50] Increased replacement of carrier supplied equipment threatens to cause substantial increases in the rates paid by the public for ordinary telephone service. Because certain carrier supplied terminal equipment, such as complex business PBXs and key telephone systems, is priced to provide revenues in excess of costs, this contribution offsets common overhead for the telephone system and helps to hold rates for basic residential telephone service below the levels that would otherwise be necessary to produce the required overall return.[51]

Studies submitted to the FCC showed that the aggregate impact of increased customer substitution will

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[50] The program requires carriers to permit *direct* connection of customer supplied equipment, prohibits carriers from requiring carrier connecting arrangements or network control signaling units, and requires (with narrow exceptions) that new line terminations and registered equipment be equipped with standard plugs and jacks for "plug in" installation. Pet App. 6i.

[51] See Response of the Bell System Companies, Third Supplemental Response of the Bell System Companies, and Bell Exhibits 1, 1A, 1B, 18 and 18A, in FCC Docket No. 20003.

be enormous. An investigation by the state commissioners' organization—not the telephone companies—forecasts increased intrastate and exchange rates representing $360-740 million *annually* by 1970 and $900 million to $1 billion *annually* by 1984.[52] Lengthy analyses made by the Bell System, Continental, and other telephone companies consistently revealed that increased rates would flow from customer substitution.[53] This burden threatens to fall with special force on low-income customers.

Initially, the FCC promised to consider in this case the economic impact of increased customer replacement of carrier terminal equipment (see pp. 9-10, above); deed, its Chairman wrote to the state commissioners that "an in-depth study" of the "economic impact of liberalized interconnection" was a question "*integral* to a fair resolution" of the present docket.[54] The FCC then reversed course and established its new program *without* considering this basic economic issue. In fact,

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[52] NARUC, *Report After Investigation* 18-19 (1974). The NARUC study concluded that:

> "[T]he effect of interconnection is likely to be equally as significant, if not more significant, for the independent industry as for the Bell System, and further, that interconnection may significantly impair the availability of service at reasonable prices in the less developed or rural areas of the country." *Id.* at 50.

[53] Comments of GTE Service Corp., April 21, 1975, App. I-A, p. 10, in Docket No. 20003; Bell System Ex. 45, p. 31, in Docket No. 20003; *Economic Impact of Competition on Telephone Operations in the Continental Telephone System*, p. 6, submitted by Continental Telephone Corporation in Docket No. 20003.

[54] Letter from Dean Burch, FCC Chairman, to Ben Wiggins, Chairman, NARUC Committee on Communications, Aug. 4, 1972 (emphasis added).

it expressly declared that its decisions promulgating and implementing the registration program are concerned "only" (Pet. App. 14b) and "solely" (Pet. App. 7c) with the mechanics of the program and not its economic impact. As Judge Widener observed in a dissent below, this case involves nothing less than a "stout refusal [by the FCC] to conduct a reasoned inquiry into the economic implications" of its actions. Pet. App. 36a.[55]

Clearly the FCC was obligated to consider the economic impact of its registration program before adopting a major new federal program that, once fully implemented, will be largely irreversible. The Communications Act makes service "at reasonable charges" a specific goal (Section 1, 47 U.S.C. § 151) and decisions under the Act and under allied statutes make plain that it is reversible error for a regulatory agency to refuse to consider a significant adverse economic impact on the public.[56] The majority opinion admitted

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[55] The majority opinion attempts in fact to convey the impression that the FCC actually did give some consideration to economic impact and thus asserts that "[w]hat the FCC has done is make reasonable assumptions about economic impact based on the evidence currently available." Pet. App. 35a. The majority opinion nowhere indicates what evidence formed the basis for the supposed FCC "assumptions"; nor does it cite any portion of the FCC's orders where the asserted assumptions were made. The fact is that the FCC did not make any such assumptions, much less pursue the requisite analysis of economic impact. Rather, the FCC explicitly refused to consider the economic issues, clearly stating that it considered such issues "not [to] fall within the scope of [the registration] proceedings." Pet. App. 7c.

[56] *E.g., Atlantic Refining Co.* v. *Public Service Comm'n*, 360 U.S. 378 (1959); *FPC* v. *Hunt*, 376 U.S. 515 (1964); *Carter Mountain Transmission Corp.* v. *FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

that it would be "remiss" if it permitted a registration program having major effects on telephone rates to be implemented "without even considering that potential economic impact." Pet. App. 33a.

However, since the FCC had conspicuously failed to analyze the economic impact, the majority opinion was forced to supply this deficiency itself. To fill this gap, the court sought to provide its *own* conjectures and assumptions in its *own* attempt to show that the economic impact of the registration program would be slight. Pet. App. 30a-32a. Not surprisingly, its attempt—unsupported by facts and untested by administrative proceedings—is riddled by unproved premises,[57], faulty logic[58] and even disregard of the program's full consequences.[59]

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[57] For example, to construct its analysis the lower court was forced to brush aside the significant direct costs of registration and engage in guesswork about the costs of connecting arrangements and network control signaling units, the costs for non-carrier suppliers in registering their equipment, and possible future price changes by such suppliers. Pet. App. 28a-29a, 30a-32a.

[58] In an astonishing leap of imagination, the court asserted that past substitution of customer equipment had not been shown to diminish carrier terminal equipment "sales." Pet. App. 32a. Not only have such replacements *necessarily* diminished carrier revenues but there is no basis for reasoning that past experience in any way measures the economic consequences of the FCC's new registration program providing for "plug in" substitution of customer supplied equipment. See pp. 31-32, above.

[59] Without support, the lower court made the incredible assertion that "the *registration program* can hardly be expected to cause a significant 'substitution effect'" Pet. App. 32a (emphasis in original). This is simply untenable, for—as the dissenting judge below emphasized—the registration program for the first time accords each "telephone subscriber . . . a right of virtually unrestricted interconnection of his own equipment." Pet. App. 39a.

Regardless of the merits or demerits of the majority opinion's reasoning and assumptions, they are an impermissible surrogate for agency findings made in this case and themselves subject to judicial review. At least since this Court's decision in *SEC* v. *Chenery Corp., supra,* 318 U.S. at 93-94, it has been settled that administrative "action must be measured by what the [agency] did, not by what it might have done." The registration program must "be upheld, if at all, on the same basis articulated in the order[s]" of the Commission. *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 169 (1962). Since the grounds set forth in those orders were "inadequate," the court below was "powerless to affirm the administrative action." *SEC* v. *Chenery Corp.,* 332 U.S. 194, 196 (1947). Nevertheless, the court proceeded to affirm the FCC's orders on the basis of its own analysis which is filled with the very sort of errors that the *Chenery* doctrine was intended to prevent.

Realizing the error it had committed, the FCC itself, *after* briefing and argument in this case, rushed out an initial report in Docket No. 20003 and transmitted it to the court below.[60] Predictably, the initial report sought to belittle claims of economic impact from customer substitution. But even this report, manifestly shaped as a litigation document, admits that any loss of terminal equipment "can" produce "a net reduction in local operating company revenues" (para. 27); that any impact "would probably be felt most severely by small independent telephone companies" (para. 28); that revenue shifts "might possibly" result where "small independent telephone companies might be

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[60] First Report in Docket No. 20003, released September 27, 1976, and sent to the court by the FCC on October 22, 1976.

most seriously affected" (para. 31); and that there is "the possibility" of an adverse impact on the smaller companies. Para. 260.[61]

The report cannot provide any support for the FCC's refusal to consider the economic impact of its registration program. It was hurriedly produced, after the court below stayed the registration program, without any opportunity for parties to the proceeding to comment on the validity or correctness of the studies relied upon; no proposed findings were ever prepared; and no briefing or argument to the Commission has ever occurred. Most important, the report—carefully framed *not* to include an order—has never been subject to judicial review and its unreviewed findings cannot be smuggled into this case through the back door.[62]

The FCC's error in refusing to consider the ultimate economic impact of its registration program is both manifest and virtually self confessed; it alone would warrant certiorari. In addition, the lower court's affirmance of the FCC's error, based on the court's own substituted analysis, has frustrated the proper allocation of responsibility between court and agency. Such a departure from established practice by a reviewing court "raises questions of high importance" requiring action by this Court to ensure that the bounds of judi-

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[61] As a dissenting commissioner correctly summarized the matter: "[T]he majority herein recognizes *for the first time* that the fears voiced by the independent telephone companies of serious financial harm and those voiced by the state regulators of the likely necessity for increased residential rates could have a valid basis *if* the Commission's recent policies are completely successful." (Emphasis in original.)

[62] Even the lower court expressly disclaimed any reliance on the report in Docket No. 20003. Pet. App. 10a n.6.

cial review remain both understood and respected. *Cf. NLRB* v. *Waterman S.S. Co.*, 309 U.S. 206, 209 (1940).

Indeed, this Court has previously concluded that where a court has strayed as clearly as has the court below from established principles governing judicial review of administrative action, summary reversal of the lower court's decision is appropriate. See *Northern Indiana Public Service Co.* v. *Isaak Walton League*, 423 U.S. 12 (1975). Consistently with this view, we submit that even if this Court should conclude that the other issues raised by this petition do not warrant review on certiorari, the Court should at the very least grant certiorari and summarily reverse the majority's decision insofar as it sustains the registration program through its own independent analysis of the program's economic consequences.

CONCLUSION

The Court should grant certiorari and the case should be set for plenary review of the issues posed by (1) the FCC's attempt to promulgate its registration program in clear violation of the limits expressly fixed on its jurisdiction by Section 2(b)(1) as well as of Section 221(b) of the Communications Act, (2) the FCC's unlawful inclusion of carrier equipment in the program and (3) the lower court's clear failure to adhere to the limits on judicial review of administrative action fixed by this Court's decision in *SEC* v. *Chenery Corp., supra*. Alternatively, the decision below should be summarily reversed on the third issue to ensure that the established limits on judicial review remain clear and unimpaired.

Respectfully submitted,

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